

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 01-0004

WITHHOLDING TAX

FOR TAX PERIODS: 1993-1996

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Issues

1. Withholding Tax- Calculation

Authority: IC 6-3-4-8 (a), IC 6-8.1-5-1 (b), IC 6-2.1-6.2.

The taxpayer protests the assessment of withholding tax.

2. Tax Administration-Penalty

Authority: IC 6-8.1-10-4, 45 IAC 15-11-4.

The taxpayer protests the assessment of the One Hundred Percent (100%) penalty.

Statement of Facts

The taxpayer is a full service bridal shop. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional withholding tax, interest, and penalty. The taxpayer protested and a hearing was held on the taxpayer's contention that the department incorrectly calculated the withholding tax and incorrectly imposed the one hundred percent (100 %) penalty.

1. Withholding Tax- Calculation

Discussion

Indiana requires employers to withhold adjusted gross income taxes from employees' wages and remit the taxes withheld to the state pursuant to IC 6-3-4-8 (a) in pertinent part as follows:

. . . every employer making payments of wages subject to tax. . . shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. . . Such employer making payments of any wages:

- (1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section. . .and
- (2) shall make return of and payment to the department monthly of the amount of tax which under IC 6-3 and IC 6-3.5 he is required to withhold.

Pursuant to IC 6-8.1-5-1 (b), all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect.

The department totaled the wages and officers' compensation reported on year's respective Corporate Income Tax Return (Form 1120) and this amount was multiplied by the state's withholding rate of 3.4% to arrive at the proposed tax liability.

The taxpayer contends that the department should not have withheld on the first one thousand dollars (\$1000) paid to each of the employees pursuant to IC 6-2.1-6.2 as follows:

- (b) Except as provided in subsection (c), each calendar year each individual, firm, organization, or governmental agency of any kind who make payments to a nonresident contractor for performance of any contract, except contracts of sale, shall withhold from such payments the amount of gross income tax owed upon the receipt of those payments under this article. . .
- (c) A withholding agent who withholds gross income tax pursuant to subsection (b) may not withhold any gross income tax for the first one thousand dollars (\$1,000) paid to a nonresident contractor during a calendar year.

The cited statute clearly refers to withholding on the gross income tax of nonresident contracts. The taxpayer errs in its interpretation that it did not need to withhold and remit tax on the first one thousand dollars (\$1000) of its employees' adjusted gross income pursuant to the cited statute. The employees were not nonresident contractors and the assessment concerns the adjusted gross income rather than gross income tax.

The taxpayer failed to sustain its burden of proving that the department incorrectly calculated the withholding tax due to the state.

Finding

The taxpayer's protest is denied.

2. Tax Administration-Penalty

Discussion

The taxpayer also protests the imposition of the one hundred percent (100%) penalty pursuant to the following provisions of IC 6-8.1-10-4:

- (a) If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty.
- (b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100%) multiplied by:
 - (1) the full amount of the tax, if the person failed to file a return

The application of this penalty is further described and clarified at 45 IAC 15-11-4 as follows:

The penalty for failure to file a return or to make full payment with that return with the fraudulent intent of evading the tax is one hundred percent (100%) of the tax owing. Fraudulent intent encompasses the making of a misrepresentation of a material fact which is known to be false, or believed not to be true, in order to evade taxes. Negligence, whether slight or great, is not equivalent to the intent required. An act is fraudulent if it is an actual, intentional wrongdoing, and the intent required is the specific purpose of evading tax believed to be owing.

The taxpayer argues that it had business problems such as publicity surrounding an irate patron's complaint with the Indiana Attorney General's office that should reduce the penalty to the negligence penalty. Business problems, however, are not a relevant factor in determining whether or not a taxpayer fraudulently failed to pay tax.

In this case the taxpayer seriously misrepresented the amount of withholding tax due to the state. Often the taxpayer filed returns stating that there was no liability at all when employees had in actuality received wages. Even when the taxpayer actually filed tax due returns, it did not remit the funds to the state. The taxpayer indicated that it knew it should remit taxes. The penalty was properly applied.

Finding

The taxpayer's protest is denied.